THE NEW GERMAN CIVIL CODE.

THE enactment of the new German Civil Code, the Bürgerliche Gesetzbuch, took place on August 18, 1896, but the act provided that it should not take effect until the first of January, 1900. It was necessary to allow the legal profession to become familiar with the new law, and it was deemed proper that the date chosen for the beginning of its actual operation should mark the significance of the event. The year 1900 brings to Germany the consummation of legal unity, which confirms the political unity achieved thirty years ago.

To the greater part of Germany the new Code does not mean a transition from unwritten to written law. The common law, which is the Roman law considerably modified by German institutions, customs, and statutes, had to yield in many territories to various codifications, emanating from one or the other of the many sovereignties which divided Germany. Of these codes, the most important were the Prussian Landrecht of 1794, in force in the greater part of Prussia, the Saxon Code of 1863, and the Code Napoleon of 1804, which had deen adopted in all parts of Germany west of the Rhine, and, in an official translation, in the Grand Duchy of Baden. In many other places, local statutes and customs had partly superseded the common law, producing in some matters a perfect chaos of legal systems. A memorial presented by the German government to the Reichstag to accompany the proposed Code, which was in 1896, gives a summary of the geographical distribution of law in Germany. Besides the great codes, it enumerates thirty of the "more important" legal systems. Thirty-three per cent of the Germans had their laws written in Latin, fourteen per cent in French.

The German Imperial Constitution of 1871 enumerated among the subjects of federal legislation the law of obligations, crimes, commerce, bills of exchange, and procedure. The commercial law and the law of bills and notes had already been codified under the German Federation of 1815, and the codes had become law by the concurrent action of the several states. These two codes were simply reënacted as federal statutes. Efforts were made from the beginning to enlarge the scope of the federal legislative power so

as to make it cover the whole of the private law, and the agitation for this purpose commanded the support of large and increasing majorities in the Reichstag. The state governments represented in the Federal Council hesitated somewhat, but early in 1873 the federal government declared in the Reichstag that the unanimous consent of the state governments to the required constitutional amendment might be expected. On December 30, 1873, the amending act became a law. It extended the federal power of legislation over "the entire civil law, the criminal law and procedure."

It had become settled by this time that the power would be exercised by codification, and not by the enactment of a series of special statutes covering limited topics. The criminal law had already been codified, and draft codes of criminal and civil procedure were under consideration and became law in 1877.

In undertaking the codification of the private law, the government proceeded with a deliberation and thoroughness corresponding to the magnitude of the task. A preliminary commission of five superior judges was first appointed to make suggestions as to the method to be pursued in framing a draft code. One of the principal recommendations made and adopted was that the preparation of the Code should not be left to the regular staff officials of the German government, who usually draft the legal measures submitted to the legislature, but that a commission *ad hoc* should be created, to consist of judges, officials of the department of justice, and law teachers at the universities, with power to employ special assistants, and to call for information on the authorities of the several states. It was contemplated that the different parts should be drafted by individual members of the commission, the whole then to be revised by the commission sitting together; and that the result should be published for criticism aud suggestions, to serve as a basis for a second reading.

In July, 1874, the Federal Council appointed a commission of eleven members, of whom nine were practical jurists (judges and high officials), and two university professors. The chairman of the commission was Dr. Pape, the president of the Imperial Commercial Court, the highest federal tribunal at the time.

The commission began its sessions in September, 1874, and the next six years were devoted to the work of preparing preliminary drafts of the five main divisions of the Code, each of which was assigned to one member. During this time the draftsmen met weekly, but the commission as a whole had only annual sessions of

comparatively short duration. The work of the whole commission began in 1881 and ended at the close of the year 1887, when the first draft code was submitted to the chancellor. Thirteen years had thus been spent upon its preparation.

The draft, together with a condensed edition of the explanatory notes, was published in 1888. These notes, called "Motive," fill five volumes of about four thousand pages in the aggregate, while the unpublished original notes are far more voluminous. Even the abridged edition contains an enormous mass of material, and undoubtedly forms the most valuable treatise on comparative jurisprudence ever published.

The first draft called forth a flood of papers, pamphlets, and books, and there was probably not a legal writer in Germany who did not contribute his share of criticism. Criticism of course had been invited by the publication, and was its main object; but the commissioners could hardly have expected, after the painstaking and conscientious labor of many years, to find that the criticism was in the main unfavorable. Ample tribute was paid to the care and learning displayed in every part of the codification; but exception was taken both to its form and to the general spirit of its provisions. The wording was regarded as abstruse, clumsy, and in many respects not easily intelligible; and it was unfavorably compared to the lucidity and simplicity of the French Code. It was urged that the Code should be a guide to the people, as far as the nature of the material allowed, and that its language should be plain and popular in the best sense of the word. As for the general spirit of the provisions, it was contended that it was too Romanistic, and not sufficiently German in character, and that it failed to do justice to the social requirements of the age. The word "social" has obtained a great vogue in matters of legislation in Germany, and has become one of the catchwords of political discussion; it refers chiefly to the condition of the laboring and other economically dependent classes, and, in connection with the Civil Code, meant that the extreme assertion of the right of property and the liberty of contract should be restrained, especially in the matter of debt and employment. Professor Gierke, of Berlin, a jurist of rare learning and ability, and a strong believer in the "social" superiority of German over Roman legal ideas, wrote a book entitled "The Draft of a Civil Code and the German Law," which is the clearest and most eloquent summing up of the various objections brought against the proposed Code, and probably also the most readable account of its leading provisions and principles.

The government regarded the force of adverse criticism as sufficient to recommend an entire recasting of the first draft, and this work was intrusted in 1890 to another commission of twenty-two members, partly jurists, partly economists, and partly experts in different branches of trade and industry. This commission adopted the plan of keeping the public informed of the progress of its deliberations and of all conclusions reached, thus getting the benefit of criticism and advice as the work was progressing and before its results were presented as a whole. The second draft was published in 1894, this time a simple text without explanatory notes; but the minutes of this commission are in course of publication. The first draft had been used as a basis, but a great many changes were made both in form and substance. It is known that the technical improvements are largely the work of Professor Planck, of Goettingen. Its superiority over the first draft is generally acknowledged, and in the matter of language must be apparent to any one.

The second draft went to the Federal Council for discussion in October, 1895. A memorial containing brief comments upon the several provisions of the Code was published by authority in 1896. On January 17 of that year the Code was submitted to the Reichstag, and by it referred to a committee of twenty-one members, which had fifty-three meetings and reported on June 12. The discussions in the body of the House on the second and third reading occupied the month of June, and the act was passed by a large majority on July 1. On August 18, 1896, the Emperor promulgated it in the Imperial Gazette, thus completing the constitutional requirements of enactment; but, as already mentioned, the act itself postponed the time of its taking effect to January 1, 1900.

It is not possible to give in this article anything like a complete analysis of the Code, and I shall therefore merely attempt to give a very general idea of its system, and to illustrate by some of the more striking provisions its policy and principles.

The scope of the codification is indicated by its main divisions. These are, besides a general part, the law of obligations, the law of property, the law of family or domestic relations, and the law of inheritance. A separate introductory Act contains in its first chapter a concise statement in thirty-one sections of the principles of the so-called Conflict of Laws, as they are to be administered by German courts. This, I believe, is the first authoritative codification of an interesting branch of the law of rapidly growing importance. The scope of the Code is materially limited by the omission from it of most of those matters which had been previously regulated

by other imperial laws; above all, the whole commercial law, the law of bills and notes, of shipping, of common carriers, insurance, patents, copyright and trade-marks and bankruptcy. It thus appears that for many of the most important business transactions reference must be had in the first instance to separate statutes, and only for more general principles, such as joint parties, assignment, release or rescission, to the law of obligations as regulated by the Code. The general part contains a chapter on corporations, but as all business and public corporations fall under special laws, this chapter relates almost exclusively to organizations of a social character, and to incorporated trusts. In the law of property, important reservations have been made in favor of the local laws of the several states, while the books on family law and on inheritance cover their respective subjects almost completely.

The general part contains a miscellaneous collection of provisions which did not seem to belong exclusively to any one of the four other books. They relate to the following subjects: Natural and juristic persons, different kinds of property and appurtenances, acting capacity, void and voidable acts, offer and acceptance, conditions, agency and ratification, time, limitation and prescription, and private means of redressing wrongs and securing rights. In connection with the law of persons, the Code regulates fully the matter of presumption of death from absence, and establishes novel principles on two other points: it recognizes that a person may have his domicil at two different places at the same time (§ 7), and it protects the members of a family against the unauthorized use of the family name by a stranger (§ 12).

Upon the fundamental question, what constitutes a legal wrong? the Code takes on the whole an advanced position. Section 226 provides that the exercise of a right is not allowed where its only purpose can be to inflict injury upon another, and § 826 says that whoever intentionally inflicts injury upon another in a manner contrary to the common standards of right conduct (in einer gegen die guten Sitten verstossenden Weise) shall be liable for damages. This is a full recognition of malice as a cause of action, and it may perhaps be carried to dangerous applications. The extreme assertion of the right of ownership is further checked by providing (§ 905) that an owner cannot forbid encroachments upon his property made so high above or so far below the surface as not to affect his interests, and (§ 904) that he cannot forbid encroachments necessary to avert a present danger of injury disproportionately greater than the injury to the property, leaving, however, to the owner a claim for

actual damages in the case last mentioned. This latter provision sanctions what would be under most legal systems a technical wrong committed with practical impunity, and is characteristic as showing how careful the Code is to avoid a conflict between legal right and common sense. The same "social" spirit which has dictated these checks upon the abuse of ownership also restrains the liberty of contract by the rule, found in § 138, avoiding any contract which through exploitation of the improvidence, inexperience, or the necessities of the obligor exacts a manifestly excessive return for the consideration moving from the obligee. This provision, which was added by the commission of the Reichstag, is in addition to the prohibition of professional usury, which is covered by separate legislation. In view of these restrictions on the rights of property and liberty, it is interesting to note that the Code recognizes redress by private act by allowing a claimant to take, destroy, or damage property, or to arrest the person obligated if there is danger of his escape, or to overcome by force resistance to an act which a person is under obligation to suffer, provided in all these cases that authoritative aid cannot be obtained in time to avert the danger of losing the claim, or having its realization unduly jeopardized (§ 229).

It is remarkable how brief the Code is on the subject of torts; only one chapter of thirty-one sections is devoted to the matter. a large number of torts are covered by the simple provision that every one is liable for the damage he does by an illegal, intentional, or negligent violation of the life, body, health, liberty, property, or other right of another (§ 823). Special provision is then made for libel and slander and seduction (§§ 824, 825). Liability for the acts of servants and wards, and for damage done by animals, is regulated, and full provision made regarding the measure of damages.

For permanent personal injuries impairing the earning capacity of the injured, compensation is made as a rule by periodical payments, and only for special reasons by a lump sum (§ 843). Where an injury inflicted affects body, health, liberty, or female honor, the damages recoverable are not limited to pecuniary loss (§ 847). The Code recognizes a qualified liability upon equitable considerations of a child or a *non-compos*, saving to him sufficient means to support him according to his station in life (§ 829). In cases of contributory negligence, damages may be awarded according to the comparative degree of fault (§ 254).

With regard to contracts, the general rule, following the principle previously adopted by the Commercial Code is that no form is

required for their validity. Of the exceptions to this rule, the most important is that of contracts for the transfer of real estate, which require judicial or notarial authentication (§ 313). It may be mentioned here that a similar authentication is provided for in the case of wills; but a will may also be validly made by a declaration written, signed, and dated in the testator's own hand (§ 2231). In accordance with the principles of the civil law, a consideration is not essential to a valid contract, but absence of a lawful ground for a promise is a good defence to its enforcement (§ 821). In case of mistake as to the substance of any legal act, the act is voidable, but the party avoiding it is liable to the other for the damages which the latter has suffered by a justifiable reliance upon its validity (§§ 119, 122). A contract may be made for the benefit of a third person so as to give him a right of action (§ 328).

The provisions regarding special classes of contracts contain many interesting points, a few of which may be mentioned. The performance of a promise of a gift may be refused, if it would leave the promisor without adequate means of support according to his station in life (§ 519); every such contract, moreover, requires judicial or notarial authentication (§ 518). The promise of a loan may also be revoked if the borrower's solvency is unexpectedly impaired (§ 610). It is provided that in brokerage contracts the right to a commission is forfeited by the broker's acting for the other party contrary to the spirit of the transaction (§ 654). A marriage brokerage contract does not entitle to a commission, but a commision paid under it cannot be recovered (§ 656). Under wagering contracts we find the rule that where a contract for the purchase and sale of commodities or securities is made with the understanding that only the difference between the contract price and the market price at the time set for delivery is to be paid by the loser to the winner, such contract is to be regarded as a wagering contract; *i. e.*, it is void, but what has been paid in accordance with it cannot be recovered (§ 764). The title on the contract of service gave rise to extended discussions in the Reichstag; perhaps the most noteworthy provision is that every contract of service made for life or for a longer term than five years may be terminated after the lapse of five years on giving six months' notice (§ 624). The Social Democrats had moved to reduce this period to one year. The Code treats all kinds of service alike, except that the right to terminate is somewhat varied according to the grade of service; but the great bulk of labor legislation is covered by special statutes,

commercial clerks and sailors stand under the Commercial Code, and domestic service is left to the law of the several states.

The third book of the Code dealing with property is largely taken up with the law of real estate. In the creation and transfer of rights in real estate, the principle of registration is strictly applied; and registration does not merely serve the purpose of notice, but is the essential step in passing title (§ 873). The technicalities of recording are regulated by a separate statute. Mortgages may be created without personal liability, and property can be burdened with the payment of rent charges, which, however, cannot be made perpetual (§ 1202). It may be mentioned here that, while the recognition and regulation of estates entailed in perpetuity is left to the local laws, the Code provides for ordinary cases that a remainder cannot be limited to take effect at a time later than thirty years after the testator's death, unless it is limited upon an event happening to a particular tenant or remainder-man who is living at the death of the testator (§ 2109).

As to personal property, the law of pledge is very fully regulated, and quite elaborate rules have been enacted to determine how lost and found property is to be dealt with. The German law does not allow the title to property to be transferred by mere consent, but requires, as the Roman law did, delivery (§ 929). Another principle of great importance is that title to personal property passes if the property is acquired in good faith from one having possession, provided that the owner had not lost his possession by theft or accident (§§ 931–935). In other words, the owner of personal property, by intrusting its possession to another, puts it in the power of the latter wrongfully to dispose of the title; a *bona fide* purchaser for value being absolutely protected; while a *bona fide* taker without consideration is liable to the owner on the theory of unjust enrichment (§ 816). These rules regarding title to personal property correspond to the maxim of the French law: "En fait de meubles possession vaut titre."

The law of family relations is introduced by a declaration to the effect that a promise to marry is not actionable, and that stipulations for a penalty for breach of promise are void; but damages may be recovered for actual loss and expenditures incurred, unless the breaking off of the engagement was justified by important reasons (§§ 1297, 1298). The enactment of the Code furnished an opportunity to reopen the question of the civil marriage, which had already been decided by a law of 1874. The government took a

firm stand, declaring that it would sooner see the whole Code lost than abandon the absolute requirement of marriage before a civil officer. All that the Catholic party and the other enemies of compulsory civil marriage could obtain was the insertion of a section declaring that religious obligations regarding marriage were not affected by the Code (§ 1588), a provision without legal significance, but of possible moral value.

There are some interesting provisions regarding personal rights and obligations incident to marriage. The husband is given power to determine all questions touching marital life, especially domicil and residence, provided that this power is not abused (§ 1354); the wife is given the so-called power of the keys; *i. e.*, she manages the domestic affairs, but subject to the husband's power, so that the recognition of her right amounts in reality only to a presumption, valuable especially in binding the husband to acts done by the wife within this sphere (§§ 1355–1356). The obligation of the wife to render services in the household or in the husband's business depends upon the customs prevailing in their station of life (§ 1356). The duty of support and maintenance falls primarily upon the husband, secondarily upon the wife (§ 1360.)

Proceedings to annul a marriage may be brought on the ground of essential error or deception; but deception regarding the pecuniary condition of either party cannot be relied upon (§§ 1339, 1340). The recognized grounds of divorce are: adultery and certain offenses against morality; attempts upon the life of husband or wife; desertion; grave violation of marital obligations, or infamous conduct making further common life intolerable; and finally incurable insanity. Perhaps no other provision of the Code was so hotly contested as the recognition of this last ground of divorce; the Reichstag struck it out on the second reading of the bill, but reinstated it on its final passage.

Another controversial point was the regulation of the property relations between husband and wife, a matter in which there had been the most bewildering diversity of local customs and statutes, so that in some cases different systems prevailed in different parts of the same city. A strong plea was made for the principle of separate property rights of married women, and the women's clubs and societies pronounced in favor of it; but the prevailing opinion was that, while this might be the system of the future, for the present it ran counter to German ideas and customs, especially among the peasant classes; and the Code declared in favor of the

system by which the husband obtains the income from the wife's estate, and the power to manage all her property according to his discretion; but the Code allows the adoption by agreement of the system of separation of property, as well as of some modified systems of community, which it likewise regulates in full.

The treatment of the law of property incident to marriage shows the conservative character of the codification. The consolidation of many different systems of private law into one made changes inevitable, and the opportunity was taken of introducing a considerable number of reforms; but radical departures from existing conditions were avoided, and the fact that some principle generally prevailed through the greater part of Germany was in most cases accepted as conclusive in favor of its adoption. This conservative policy of the codifiers undoubtedly facilitated the passage of the act through the legislature.

It is true that a considerable amount of controversial matter was eliminated by leaving to local law or to separate federal statutes nearly all relations of a public or quasi-public character. The Code naturally abrogates an enormous mass of local law, by which hitherto the great bulk of civil relations had been regulated; but the Introductory Act enumerates a long list of matters with regard to which local provisions are to remain untouched, including perpetuities and restraints on alienation, statutes of mortmain, religious societies, the law of mines and waters, of fish and game, of insurance, of author and publisher, nearly all property relations between the individual and the state, and nearly all public or semi-public property. The amount of separate federal legislation in matters of property is likewise very large, the Commercial Code alone covering many of the most important transactions of business life. The many questions that must arise as to the relation between the Code and the rival laws thus left in force have as far as possible been expressly regulated. In order to bring the other federal laws into harmony with the principles of the Code, nearly every one of them has been amended in important particulars, and a revised version of the Commercial Code has been enacted. Similar work is being done in the several states.

The enactment of the Civil Code nearly concludes the work of systematic codification which has been going on in Germany during the last fifty years, and which the annals of legal history parallel only in the legislation of Justinian and that of Napoleon. The Civil Code is properly regarded as the climax of this work; for in every

system the private law is the foundation of jurisprudence and the most mature expression of the reason of the law. Being more independent of conditions of time and place than other branches of the law, it has preëminently the character of a fundamental and permanent law. The civil law of Rome has spread over Continental Europe, and has retained its authority for many centuries; the French Code has been largely adopted by other countries; and even at this early stage of its history the German Code has been made the basis of the codification of the private law of Japan. There is no reason why the German codification should not have its influence on civil legislation in the countries of the common law. We are apt to notice the differences between the common and the civil law far more than the many features they have in common; but the latter are the more important, and perhaps the most striking differences between the two legal systems are due to accidents of historical development rather than to fundamental or irreconcilable views of legal policy. Problems of private law must be ultimately settled upon purely rational principles, and these are essentially the same where funadamental economic conditions are alike. It is this element of universality and permanence in the principles of private law which gives to such a work as the German Civil Code an interest and an importance extending far beyond the territory of its immediate operation.

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December, 1899.